



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 15 OF 2010

REPUBLIC

VERSUS

- | | | |
|------------------------------|---|--------------|
| 1. JANET KARAMANA GITUMA |] | |
| 2. EVANS OBANGI OTWORI |] | |
| 3. LAWRENCE KARIUKI GITHINJI |] |ACCUSED |
| 4. CLEMENT MUNYAO KATIKU |] | |
| 5. ANDREW MUUA KIMOMO |] | |
| 6. ANTONY MUTHII MATI |] | |
| 7. PETER MAINA KIBE |] | |

JUDGMENT

The seven accused persons herein, *Janet Karamana Gituma* [hereinafter referred to as Janet and [A1] interchangeably], *Evans Obangi Otwor* [hereinafter referred to as Evans and [A2] interchangeably], *Lawrence Kariuki Githinji* [hereinafter referred to as Lawrence and [A3] interchangeably], *Clement Munyao Katiku* [hereinafter referred to as Clement and [A 4] interchangeably], *Andrew Muua Kimomo* [hereinafter referred to as Andrew and [A5] interchangeably] *Antony Muthii Mati* [hereinafter referred to as Antony, Mugendi and [A 6] interchangeably], *and Peter Maina Kibe* [hereinafter referred to as Peter and [A7] interchangeably], are jointly charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge are that on the 23rd day of October, 2009, at Garden Estate in Nairobi within the Nairobi Province, jointly with others not before the court murdered *Moses Mbaabu Gituma*, [hereinafter referred to as the deceased]

The prosecution called 21 witnesses in support of the state case.

Beth Wairimu Ndegwa, [PW 1], testified that on the night of 23rd day of October, 2009, she was watching television in the house of Moses Mbaabu Gituma in the company of Kelvin Munene Gituma [PW7] and Beatrice Gaicugi [PW9]. At about 8.30pm Janet Gituma [A1] knocked the main door. Beatrice Gaicugi [PW9] promptly opened. Some four masked men, wearing dark glasses, in the company of Janet [A1] forced their way inside the living room.

The four men ordered them [3] to lie down. To enforce their order they slapped them and snatched their cell phones. PW 1 had a Nokia cell phone model 1208. PW9 equally had a Nokia cell phone. The four men specifically asked for, *Moses Mbaabu Gituma*, the husband to Janet [A 1]. All of them were bundled into the toilet cum bathroom one by one. Janet [A 1], was however, left in the living room in the

meanwhile.

One of the assailants was left guarding Beth, Kevin and Beatrice. Janet remained in the sitting room with three [3] of the assailants. Shortly thereafter Janet joined Beth, Kevin and Beatrice in the toilet-cum-bathroom. About 2.00am on 24th October, 2009 the deceased arrived home and parked his vehicle in the garage.

She heard the footsteps of the deceased climbing the stair-case to the bedroom upstairs. Shortly thereafter, she heard the screams of the deceased. After some commotion the two assailants came to fetch Janet from the toilet-cum-bathroom. They asked Janet to go with them.

After the assailants left, she stayed in the toilet-cum-bathroom for about five minutes together with PW7 and PW9. Out of curiosity they went to look for Moses Mbaabu Gituma. They found him bleeding profusely from the head at the bedroom door connecting the garage with the stair-case. With the assistance of the immediate neighbours - Kimani and Murithi - Moses Mbaabu Gituma was taken to the hospital. She remained in the house as Kevin and Beatrice accompanied Gituma to Aga-Khan Hospital.

The cell phone which the assailants stole from her was a Nokia model 1208. It was red in colour. The cover, however, had been changed to black when she identified it in court.

Virginia Mutheu Nzomo, [PW 2], was at her house at Kibera sometimes in October, 2009 when Clement Munyao Katiku [A 4], a neighbour asked her for a loan of 1,000/=. As security Clement gave her a Nokia mobile model 1208 admitted in evidence as exhibit No. 1. Clement, however, did not commit when he would re-pay the loan. Two weeks later, her child fell sick. She [PW 2] approached Clement Munyao for the repayment of the loan in vain. As a stop gap measure she got a loan from Justus Mutinda Ndeko. [PW3] As security, she pledged the Nokia phone which Clement Munyao [A4] had pledged as security for a loan of shs. 1000/=.

On 13th November, 2009, Justus Mutinda Ndeko [PW3] came to her workplace with two policemen. She was arrested and detained at Kilimani Police Station for 5 days. During the detention she was interrogated in relation to the circumstances under which she acquired exhibit No. 1.

Justus Mutinda Ndeko, [PW 3], recalled sometime in the month of October, 2009, in the evening hours, when Virginia Mutheu Nzomo [PW 2] came to his house. She asked for a loan of shs. 4,000/- to take her sick child to the hospital. As security she pledged a Nokia cell phone admitted as exhibit No. I herein.

On 13th November, 2009 while working at a site on Mombasa Road, one Samson Malanga Malambi called him on phone and enquired where he was. He received the call from exhibit 1. Samson came up to his working place. As they were talking, policemen came and enquired about exhibit I which was in his possession. He divulged that he got the phone from Virginia Mutheu Nzomo [PW 2] and took them to the house of Virginia [PW 2] who was promptly arrested. Virginia [PW2] informed the Police that Clement Munyao Katiku [A4] pledged the cell phone. Clement [A4] was subsequently arrested in connection with the theft of exhibit No. 1.

Terry Wanjira Munyi, [PW 4], works at Garden Estate in a salon known as **Mota**, belonging to Janet Karamana Gituma [A 1]. She left her work place on 23rd October, 2009 at about 7.45pm. Janet remained behind at the salon. Janet's car was parked at the garage behind the salon. Janet told her that she [Janet] intended to walk or take a taxi home. Janet's house was about 2km away from the salon.

On 24th October, 2009 Terry reported to work at 7.00am. A neighbour, to Janet, Mrs Karanja, called her on phone and advised her not to open the salon since Janet and her family had been attacked that morning. She went to Janet's house with her other workmates – Caro, Eunice and Wanjiru. Janet came from Thika and found them. She heard from neighbours that Gituma [deceased] had been seriously injured and was hospitalized.

Julius Chege Muiruri, [PW 5], is the CEO of Pamoja Women Development Programme. The said

organization owns several motor vehicles. Among the fleet was motor vehicle registration No. KBH 657J Toyota Allion. The driver of the said vehicle was Kinyayu Mbogo who went to Netherlands for further studies on 20th August, 2009.

Muiruri [PW5] further testified that from the time Mbogo left, the car was parked at his compound and the keys was in his custody. From that time the vehicle was only used three times. **One**, by his personal driver from Kiambu to Ruiru. **Two** by Pastor Rev. Godfrey Mumbo. **Three**, when his personal driver took the vehicle for repair of the starter in the month of September, 2009.

He was categorical that on 30th October, 2009 at about 2.48 pm the vehicle was parked in his compound, when CID officers ordered him to take the same to CID Headquarters. At that point in time the car could not start. He was forced to use a battery from a different vehicle to start it. At CID Headquarters he was surprised to learn that the said car was involved in a crime on the night of 23rd/24th October, 2009 yet it had not moved out of his compound. His personal driver was then detained at CID Headquarters for the night. The driver was later set free after writing a statement but the vehicle was detained. The said vehicle was tendered in evidence as **exhibit No. 2**.

Michael Ndimi Kariuki, [PW 6], was a personal driver to Muiruri [PW 5] during the period 1st September, 2009 to 30th October, 2009. He used to drive motor vehicle KBA 304 B Toyota Prado. However, he confirmed that he drove motor vehicle registration No. KBH 657J, Toyota Allion on three occasions:-

1. From Kiambu to Ruiru to collect visitors – he was alone.
2. From Kiambu to Ruiru for a meeting which PW 5 was attending – he was in the company of PW 5.
3. From PW 5's house to Kirinyaga road - to repair the starter in September, 2009.

Though he knew Garden Estate, he was categorical that on the night of 23rd October, 2009 and morning of 24th October, 2009 he did not drive motor vehicle registration KBH 657J, Toyota Allion to that estate or at all. He was further categorical that in the month of October, 2009 he drove the said vehicle only on 30th October, 2009 when the police ordered him to take it to CID Headquarters.

Kelvin Munene Gituma, [PW 7], testified that on the 23rd October, 2009, he was at his parents house in Garden Estate watching television, in the living room in the company of Beth Wairimu Ndegwa [PW 1] and Beatrice Gaicugi [PW 9]. About 8.30pm someone knocked the main door. Beatrice Gaicugi opened the door. Suddenly three people forced their way into the living room in the company of his mother [A 1]. The three [3] assailants wore dark shades and marvin hats which hid their faces and identity. They ordered the four of them to lie on the floor of the living room. Subsequently they bundled them in the toilet cum-bathroom. The four were, PW 7, Beth [PW 1], Beatrice [PW 9] and Janet [A 1]. In the meantime they snatched the cell - phone of Beth [PW1] and Beatrice Gaicugi [PW 9]. One of the assailants kept vigil at the toilet-cum-bathroom. While inside the toilet he he heard some movements within the bedroom upstairs and down in the living room. The assailants demanded three million shillings from the family on pain of being harmed if they did not honor.

About 2.00am on 24th October, 2009, he heard the sound of a car being parked in their garage. So soon thereafter, he heard the screams of his father along the stair - case leading to his bedroom. After some time the assailants came to the toilet-cum-bathroom and asked her mother [A 1] to drive them away in his father's car registration number KAX 755G, Toyota Fortuner.

As soon as the assailants left, in the deceased car, with his mother [A 1] driving, he opened the toilet-cum-bathroom door and went upstairs. He found his father sprawled on the floor at the bedroom door connecting the garage with the stair - case. He noticed several deep cut wounds at the back of his neck. He sought help from a neighbour by the name Kimani who together with his son assisted in taking the deceased to Aga-khan Hospital. He accompanied his father to the Casualty Department of the said Hospital, where he was rushed to the theatre for surgery. Three months later he [father] was discharged. However, he could neither coordinate his limbs nor reason well. Immediately, after discharge the

deceased started complaining of stomach up-sets. He continuously complained of constipation. Finally he succumbed to his injuries on the 2nd day of March, 2010 within 1 year and 1 month of the attack.

No. 67356 Cpl Elkana Mongare, [PW 8], was attached to Thika Police Station as at 24th October, 2009. He testified that at about 3.55am on 24th October, 2009, Janet Gituma [A1] reported a case of kidnap and unlawful wounding of her husband at Garden Estate. Though she [A1] claimed to have been assaulted by the kidnappers, **there was no visible physical injuries**. She did not say how she got to the police station at the wee hours.

On instructions of Inspector Mebila, he rushed her to Thika Nursing Home. On the way she told him that she had left her vehicle, KAX 755G, at a petrol station. After dropping her at Thika Nursing Home he went round all petrol stations in town trying to locate the said vehicle in vain. When he returned to the police station he mysteriously found Janet [A1] there. Her car was also there. She explained to him that she had been discharged but did not say how she came by her vehicle. Subsequently, police officers from Kasarani Police Station picked Janet and also took away her vehicle. He opined that the distance from Garden Estate to Thika Police Station is about 20km away.

Beatrice Gaicugi [PW 9], was staying at Garden Estate with the Gituma's as at 23rd October, 2009. She was in the company of Beth Wairimu [PW 1] and Kelvin Munene Gituma [PW 7] watching television in the living room. At about 8.30pm someone knocked the main door. When she opened, a man forced his way into the living room. This stranger was in a group of three [3] other men and Janet [A 1]. She screamed which elicited a slap-bang or rebuke. The four men wore dark glasses, marvin hats on their head and gloves on their hands. She was ordered to enter the toilet – cum - bathroom . She obeyed. Then Kevin [PW7] was pushed into the toilet, closely followed by Beth Wairimu [PW 1]. One of the assailants kept vigil at the toilet. The assailants sought to know where the deceased was. The one keeping vigil at the toilet-cum-bathroom said they wanted Kshs. 3 million from Kelvin's father [deceased]. The conversation took place while Janet [A 1] was seated on top of the toilet cover while the rest of them were lying down on the floor as ordered by the assailants . The first accused told the assailant keeping vigil that the deceased would come back at 11.00pm. At the juncture the assailant keeping vigil ordered the three children to remove their clothes but Janet [A 1] intervened that it was too cold. The said assailant then obliged. It appeared to the witness that **Janet had her way with the assailants** .

About 12.00 midnight, one of the assailants who was outside the house came inside. Beatrice Gaicugi [PW 9] heard this assailant asking the one keeping vigil to enquire from the others where they had reached. The assailant keeping vigil then spoke to someone on phone and reported to the assailant outside the house that they had reached Thika. The assailant keeping vigil removed a panga from his bag and started sharpening it on the wall. Then this assailant threatened to shoot them. Janet [A 1] once again restrained him. **The assailant guarding the toilet-cum-bathroom seemed to understand one another with the first accused**. He seemed to listen to her.

At about 2.00am the deceased drove into the garage of his house at Garden Estate. He climbed the staircase leading from the garage to the bedroom upstairs. She then heard screams of the deceased. **Then groans**. Thereafter one of the assailants came to the toilet-cum-bathroom where they were lying on the floor. He told Janet [A 1] **that they had finished the job**. Then the four assailants left with Janet [A 1]. After confirming that the assailants had gone, she went to report to the police and Ivory Security Officers at the main entrance of Garden Estate. She narrated to the police the events as they were. Some policemen and security officers then accompanied her back to the house of the deceased where she found Kevin and a neighbour, one Kimani. The police asked Kimani to rush the deceased to Aga-khan Hospital. She accompanied the deceased to the said Hospital. She came back at 8.00am on 24th October, 2009.

Reuben Gituma, [PW 10], a brother to the deceased testified that Janet is his sister in - law. Janet was married to the deceased. On 3rd March, 2010 at about 2.00pm he went to Aga-khan Hospital Nairobi, to identify the body of the deceased for purposes of post- mortem. Thereafter the body was released to the family for burial.

NO. 66771 Cpl Moses Kiema [PW 11], was the initial investigating officer in this case . He recalled that on the 24th day of October, 2009 at 8.00am he was on patrol duties within Nairobi. The in-charge of Special Crime Prevention Unit, Mr S S P Katola, summoned him to Garden Estate. In company of Corporal Chebii, P C Ngeno, PC Owino and Cpl Driver Nzioka they met Mr SSP Katola at the compound of Gituma. In attendance were Beth Wairimu [PW 1], Kevin Gituma [PW 7], Beatrice [PW 9] and Janet [A 1]. Upon interviewing members of the family the police arrested Janet [A 1] and ordered all the family members to accompany them to the CID Headquarters. Janet [A 1] told the police that she had been robbed of a cell phone Nokia model 2630. Beth [PW 9] had also been robbed of a Nokia model 1208 and Beatrice [PW 1] had equally been robbed a Nokia cell-phone.

A statement under inquiry was demanded from the family members. The family members told them generally that the deceased drove home about 1.46 a.m on 24th October, 2009, and was viciously attacked on the stair-case leading to his bedroom upstairs, by a group of four assailants who had been lying in wait at the house.

When the deceased arrived at Garden Estate he had been given a **pass No. 255** at the main gate – barrier. That entry was made in the gate book [exhibit 3] as well as the name of the driver, the registration number of the motor vehicle and **time in**. That the guard on duty who made the entries was Evans Obangi Otworu [A 2].

Thirty four minutes after arriving at Garden Estate the same vehicle came back to the gate and entries were again made in the gate register as is the routine. This was also done by Evans Obangi Otworu [A 2]. He recovered the Gate Register which he produced in evidence as exhibit No. 3. Of particular interest the gate pass entered in exhibit 3, this time round, was No. 257 **instead** of 255. The name of the driver was still **Gituma** yet Janet was the one driving.

He was told that another vehicle, reg No. KBH 657 Toyota Allion had arrived at Garden Estate, on 23rd October, 2009 at **20.19 pm and left at 20.17 pm**. He opined that the entry was suspect since the vehicle could not have left before it arrived !!. There was something amiss. Later on he wrote to the Registrar of Motor Vehicles, **vide exhibit No. 4**, requesting for the name and address of the registered owner of the said motor vehicle, KBH 657 Toyota Allion. The response was received **vide exhibit No. 5**.

The owners of the said motor vehicle, according to exhibit 5, were as follows:-

1. Julius Chege [PW 5] – cell phone No. 0721 765 167
2. Mary Muthoni Chege – cell phone No. 066 - 22205

Julius Chege [PW 5] gave him access to motor vehicle registration No. KBH 657J parked in his compound. He [Chege] explained that the motor vehicle aforesaid was being driven by Kinyayu Mbogo who went overseas. Since he left, the vehicle had been driven only three times by Michael Ndimi Kariuki [PW6]. Other than that he had custody of the vehicle all along. He ordered Julius Chege to take the motor vehicle to CID Headquarters. The aforesaid vehicle was received in evidence as **exhibit No. 2**.

While still undertaking investigations the police received information from Safaricom Ltd that mobile phone serial number **IMEI – 357691/01/463181/1** was in use within Kirinyanga District. That the said cell phone belonged to Janet [A 1] and was stolen from her on the fateful night by the assailants.

In company of P C Ngeno and Cpl Ntara, they went to Kirinyaga. Using the technologies of mobile provider, Safaricom Ltd, it was identified that the frequency from that phone was coming from **0712-181-544**. Eventually the user was traced at Kimunya within Kirinyaga. He was identified as Lawrence Kariuki [A3]. Shortly thereafter the OCS of Kimunya Police Post informed them of the arrest of Lawrence. At the said Police Post they interrogated Lawrence Kariuki [A3] who produced Nokia 2630, which was stolen from Janet Karamana Gituma [A 1] on the night of the robbery. The same was tendered in evidence as **exhibit No. 6**.

At that juncture Lawrence Kariuki [A 3] produced a photocopy of an agreement entered into on 24th

October, 2009 between him [Lawrence Kariuki] and Antony Muthii Mati alias Mugendi[A 6]. The said agreement was to the effect that in consideration of Lawrence Kariuki paying Mugendi [A 6] the sum of shs. 200/- in addition to surrendering his [Lawrence] phone Nokia 2310, he would be the new owner of Nokia 2360. The said agreement was received in evidence as **exhibit 7**.

They arrested Lawrence Kariuki Githinji [A 3] who then called Mugendi [A 6] on cell phone. Mugendi said he was in Nairobi. It was confirmed, through Safaricom system provider, that in deed Mugendi was in Nairobi. He locked up Lawrence Kariuki [A 3] in cells at Embu and travelled back to Nairobi to try and arrest Mugendi [A6] who had by then switched off his cell phone.

On 13th November, 2009 he received a report that the **second phone**, stolen from Beth Wairimu [PW 1], was being used along Mombasa Road. Once again using Safaricom provider system, the frequency of the said mobile phone was traced at KENGEN TECHNOLOGIES, where Justus Mutinda [PW 3] was arrested. On examination he confirmed that it was the cell phone stolen from Beth[PW 1]. The serial number is **IMEI-358095/01/291808/0** and the sim card number **0720-920 759**. On interrogation Mutinda said that the phone had been pledged to him by Virginia Matheu Nzomo [PW 2]. He was ready to identify Virginia. On arrest Virginia claimed that the said phone had been pledged to her by Clement Munyao Katiku [A 4]. The following day an aunt to Virginia identified Clement Munyao Katiku [A 4] whom they managed to arrest at Kibera. He produced the phone that was recovered from Justus Mutinda as **exhibit No. 1**. It is a Nokia model 1208 serial number **IMEI-358095/01/291808/0** Clement Munyao Katiku [A 4] claimed that he bought the cell-phone from a shamba boy at Gigiri. When taken to Gigiri Clement could not identify the seller. Flowing from the evidence received regarding the said phone from various persons aforesaid, so soon after the incident, he decided to charge the 1st, 3rd and 4th accused with the offence of attempted murder on the basis of the doctrine of recent possession.

On 27th November, 2009 he [PW 10] was transferred to Ruiru. He handed over the file, relating to the attempted murder of Moses Mbaabu Gituma, to No. 48566 Cpl Babu of the Crime Prevention Unit together with all the exhibits recovered that far.

Rebecca Njeri Karanja, [PW 12], was a customer of Janet [A 1] at her salon at Garden Estate. On 23rd October, 2009, she was at Janet's salon at about 6.20pm. By 6.40pm she had finished repairing her hair. Janet remained behind. In doing so, Janet explained that she was waiting for a **fundu**. Otherwise she would have asked her for a lift home. That she intended to walk or take a **taxi** home [2 km away] that night-after 7.45 pm.

Dr Peter Muriuki Ndegwa, [PW 13], had worked with Dr. Jane Wasike Simiyu from 2005. Dr. Muriuki was familiar with Wasike's handwriting and signature. On that basis he produced the post-mortem report filled and signed by Dr. Wasike Simiyu, on 3rd March, 2010 at, Aga-khan Hospital courtesy of Section 33 as read together with section 77 of the Evidence Act [Cap 80] Laws of Kenya as **exhibit No. 8**. According to the said report, the deceased died of **peritonitis due** to peri-cupendicular mass which means the inflammation of the peritonical cavity or abdominal cavity due to the rapture of the appendix.

Dr. Vankwa Indeche, [PW 14], of Central Bank of Kenya, where the deceased was working prior to the incident, produced a report dated 10th February, 2010. The report confirmed that the deceased was well before the incident but developed memory lapses after the incident and was thus unable to perform his duties. That the recovery process could take a while. The report was received in evidence as **exhibit No. 9**.

No. 60328 Cpl Martin Imo, [PW 15], attached to Kasarani Police Station in the company of P C Musamati, P C Gichuhi, P C Kingori and P C Kegode patrolled Garden Estate and its environs on the night of 23rd/24th October, 2009. He left PC Kingori and PC Muiruri at the main gate at about 2.00am on 24th October, 2009 and proceeded on patrol with the rest – P C Musamati, PC Kingori and P C Kegode.

About 2.00 am on 24th October, 2009 a vehicle coming from behind approached the gate. He then saw

an officer of Ivory Security Guards Ltd Evans [A 2], manning the gate, receive from the driver of the said vehicle a GATE PASS. His vision was aided by the security lights fitted on the wall. He stayed at the gate for a further 15 minutes. Then a young girl aged about 17 – 18 years being escorted by two Ivory Security Guards approached him. She was crying. On inquiry she told him that her father had been shot dead and her mother hijacked. In company of other security personnel they rushed to the scene and found the deceased still breathing next to the main door leading to the stair-case. There were visible deep cut wounds particularly on the head. There was also another girl about 20 years of age, in the house, who narrated to them the sequence of events that led to the injury of the deceased. The neighbours then facilitated the taking of the injured man to hospital. He remained at the scene and reported to his seniors through the police telephone system.

The report was to the effect that a lady driving motor vehicle Reg No. KAX 755G, Toyota Fortuner, had been hijacked. About 5.00am the same day [24th October, 2009] the Police Radio Control Office confirmed that the said vehicle and Janet had been recovered. It had been abandoned at Thika together with Janet [A 1]. He rushed to Thika and found Janet [A 1] at Thika Nursing Home lying on bed complaining of headache. Janet told him that she did not know the people who kidnapped her. He made arrangements for her discharge and then took her to Thika Police Station where the motor vehicle KAX 755G was handed over to her.

No. 80147 P C David Kingori, [PW 16], stationed at Kasarani Police Station was detailed to patrol Garden Estate in the company of P C Gichuhi, P C Muiruri, P C Kegode and P C Musamati under the command of Cpl Mumo [PW 15]. Kingori and P C Gichuhi were stationed at the main Gate of Garden Estate. Apart from the policemen aforesaid, there were also three [3] other Ivory Security Guards, namely, Evans Obangi Otworu [A2] and Jared Omweno. There was also a supervisor of the said security guards-John Mateori.

The role of the Ivory Security Guards was to give motorist coming in gate pass and to receive gate pass from motorists going out, open the gate and record registration numbers of vehicles and the details of the occupants at all times. This was for security reasons and as also a matter of record.

On 24th October, 2009 at about 2 a.m a young girl reported that the car that had just left the estate had assailants on board. The said assailants had killed her father and hijacked her mother. That the driver of the car [A1], surrendered to Ivory Security Guards the gate pass which was in the car.

On receiving the report, in the company of Corporal Liwa, he escorted the reportee together with two Ivory Security Guards upto the house where the incident took place. At the house they found the victim lying in a pool of blood and unconscious. There was also a girl and a boy in the compound. They made arrangements to take the injured man to the Aga Khan Hospital. He remained at the scene to secure the same.

No. 60003 P C Mutuku Mackenzie, [PW 17], based at Thika police station was at the station at 3.50am manning the crime desk. A lady by the name Janet Gituma, under the escort of man who introduced himself as a petrol attendant, complained that on 23rd October, 2009 at 8.00p.m while walking home to her house at Garden Estate, from her salon, four [4] assailants armed with pistols kidnapped her. They frog marched her to her house then held her family hostage. In the meantime they robbed them of three mobile phones. In the process they demanded three million shillings from the family.

About 2.00am, on 24th October, 2009, the four assailants, who had laid in wait for her husband, attacked and injured him [husband] when he returned home. The assailants had earlier on robbed her of shs. 27,000/- and a Nokia mobile phone model 2630 on her way from Mota Salon on the evening of 23rd October, 2009.

Thereafter the four assailants ordered her to drive them in their family car up to Juja where the four [4] disembarked and drove away in a different car. That the get away car had been waiting for them at Juja. That during the ordeal the three children who were in their house were locked in the toilet – cum –

bathroom. The incident was booked at 3.50am in **O.B No. 9 of 24th October, 2009**. He produced the O.B. as **exhibit No. 10**. When recalled, he produced motor vehicle registration No. KAX 755G belonging to the deceased as **exhibit 11**.

Subsequently, he ordered Cpl Elkana Mongare to take over the investigations of the matter. The orderly officer, Inspector Mbila, directed the reportee to be rushed to Thika Hospital for shock management and/or treatment.

At 9.00am Chief Inspector Mbila ordered that the vehicle of the reportee, KAX 755G Toyota Fortuner, to be taken to the Thika Police Station from Caltex Petrol Station. Then he booked the vehicle KAX 755J as **entry No. 11** of 24th October, 2009. The O.B. abstract was admitted as exhibit 10 (a). Thereafter the rest of the transaction was undertaken by orderly officer, Chief Inspector Mbila.

No. 231463 Chief Inspector Phineas Mutwiri, [PW 18], the then OCS Thika Police station, with effect from 16th November, 2009, produced the OB of the said station relating to the period 13th October, 2009 to 9th November, 2009. In particular he zeroed in on the entry of 24th October under the heading:

“Motor vehicle collected”

The entry reads as follows:

“I No. 62325 Cpl Imo and P C Mocher both now oversee the collection of motor vehicle registration no. KAX 755G Toyota Fortuner to Kasarani Police Station”. The entry is signed by Cpl Imo.

No. 60652 Sgt Andrew Machemo, [PW 19], was at Kimunya Patrol Base when CID officers from Nairobi, under the command of Cpl Indura, called on him. They requested him to assist in locating a suspect by the name, **Lawrence Kariuki**, who had in his possession a cell phone having a bearing to this case. He undertook to assist.

Subsequently, Lawrence Kariuki was located and arrested. He took possession of the cell phone in question which he tendered in evidence as **exhibit No. 6**. It is a **Nokia 2630**. The relative receipt in respect of the same was tendered in evidence as **exhibit 12**.

He handed over Lawrence Kariuki to CID officers from Nairobi who interrogated Kariuki in his presence. Lawrence Kariuki's story was that one Mugendi [A 6] sold him the phone in the presence of Kimathi Gatimu. Kariuki led them to the house of Kimathi Gatimu. Kimathi then produced a document in the nature of an agreement between Kariuki, on the one part, and Mugendi [A 6] on the other part, as evidence of sale of the phone, Nokia model 2630.

The vendor [seller] was Mugendi. The buyer [purchaser] was Lawrence Kariuki. The said agreement was tendered in evidence as **exhibit 7**. It is dated 24th October, 2009. He identified Antony Muthii Mati [A 6] alias Mugendi.

On 17th November, 2009 about 12.00 noon, at Kimunya Patrol Base, Lawrence Kariuki released from custody on bond, came to the said base with Mugendi [A 6] who was frog-marched by seven members of the public. Mugendi was handcuffed using a sisal rope.

Mugendi admitted the fact that he had sold the phone to Lawrence Kariuki. CID officers from Nairobi were summoned and collected Mugendi for further interrogation.

No. 51150 – Cpl Amos Gichuki, [PW 20] attached to the special Crime Prevention Unit at CID Headquarters Nairobi was handed over the file in respect of Criminal case No. 123/455/2009. The relative court file is No. 1984/2009, 2113/09/2307/2009 and 105/2010 [Consolidated]. The complainant was the Kenya Police.. The offence charged was that of attempted murder contrary to section 22 [f] of

the Penal Code. The accused persons were four [4] in number – 1st, 2nd, 3rd and 4th as they appear in the charge sheet and the dock. The deceased was Moses Mbaabu Gituma.

Some exhibits were also handed over to him being cell-phones Nokia model 2630 and Nokia model 1208. Nokia model 2630 belonged to Janet [A 1] while Nokia model 1208 belonged to the house girl of the first accused [A1] by the name, Beth Wairimu[PW 1]. An agreement of sale regarding Nokia model 2630 between Lawrence Kariuki [A 3] and Antony Muthii Mati alias Mugendi [A 6] was also handed over to him.

By then the 4th accused, Clement Munyao Katiku, was also remanded at Kilimani Police Station. Equally, Mark Mukau and Clement Munyao were also remanded at the said Police Station.

Munyao claimed that he was sold the Nokia model 1208 [Exhibit 1] by Mark Makau. The Police then arrested Mark Makau who then led them to arrest Andrew Muua Kimomo [A5].

On 23rd December, 2009 he collected Clement Munyao Katiku [A4] and took him to Special Crime Prevention Unit. On interrogation Andrew Muua Kimomo confessed to him that the fourth accused, Clement Munyao Katiku, had stolen the mobile phone Nokia 2630 sometime in October, 2009.

On further interrogation, Clement Munyao Katiku [A 4], divulged that he had obtained **exhibit No. 1** from Andrew Muua Kimomo [A 5] who in turn denied knowledge of **exhibit No. 1**. He did not believe them. On that ground he decided to charge Clement Munyao Katiku [A4] and Andrew Muua Kimomo [A5] with the offence of attempted murder because the cell phone in question was stolen on the night of 23rd/24th October, 2009 in the course of the robbery at the Gituma's.

He visited the deceased on 5th February 2010, to take his statement but he could neither read nor write. He had memory lapses. He abandoned the exercise.

Evans Obangi Otworu [A 2] was charged on the basis of the evidence that he knowingly falsified entries in a document, namely; Gate Register, **[exhibit 3]** on the night of 23rd/24th October, 2009.

In the cause of his investigations, he established that motor vehicle registration No. KBH 657J, whose entry in Garden Estate was falsified as having entered at 8.19 hours on 23rd October, 2009 and left at 20.17 hours, belonged to Pamoja Women Development Programme. That it was not a taxi as recorded in the Gate Register **[exhibit 3]** by Evans Obangi Otworu [A2]

He visited Garden Estate to establish the security arrangements as at 23rd/24th October, 2009. He also visited the house of the deceased to familiarize himself with the scene of crime.

He interrogated accused 6 and 7. Anthony Muthii Mati alias Mugendi [A6] told him that he sold the cell-phone to the 3rd accused [Lawrence Kariuki] on 24th October, 2009 at 1.45 p.m. Anthony Muthii Mati [A6] further told him that he obtained the Nokia 2360 from Peter Maina Kibe at about 1.00 p.m on 24th October, 2009. He then established that accused 6 and 7 were not just friends but work-mates. They were matatu touts at Githurai Kimbo. Not being satisfied by the explanation he decided to charge both of them with the offence of attempted murder in [count1] and handling stolen property in [count 2].

He then compiled the evidence and forwarded the file to the DPP who advised that the seven [7] accused persons be charged with murder. Subsequently there was a request for toxicology by Dr. Wasike. A report in respect of toxicology was produced by the Government Analyst [PW 21] as **exhibit No. 13**. Last but not least, he obtained a sale receipt in respect of Nokia 2630 from Kevin Munene Gituma [PW 7]. The said receipt was tendered in evidence as **exhibit No. 12**. It is evidence that the said phone belong to Janet Karamana Gituma. Janet's [A 1] evidence is that this phone was stolen by the four [4] assailants who maimed her husband on the night of 24th October, 2009. That the four assailants also stole from her the sum of shs. 27,000/= on 23rd October, 2009. That sum was the day's collection from her Mota Salon.

Eunice Wamuyu Njogu [PW 21], a Government Analyst, in the course of her duties received certain specimen from Parklands Police Station in relation to inquest file No. 4/2010, from No. 59104 Cpl Benson Moenga. The exhibits were labelled Moses Mbaabu Gituma [deceased] in the following order:

1. Exhibit H - Stomach
2. Exhibit Y - Liver
3. Exhibit Q – Blood

She was requested to ascertain toxicology which entails the study of poisons in the specimen submitted. She prepared a report which she signed and dated 17th March, 2010. The same was produced in evidences as **exhibit No. 13**.

At the close of the prosecution's case, having carefully evaluated the sum total of evidence tendered by the prosecution witnesses, I found as a matter of law that the prosecution had adduced enough evidence to warrant the putting of all the seven accused persons on their defence. I then put all the seven accused persons on their defence after explaining to them the provisions of section 306[2] of the Criminal Procedure Code.

DW1, Janet Karamana Gituma [A1], in her sworn statement testified that she was married to the deceased - Moses Mbaabu Gituma. There are two issues of the marriage; a boy, Kelvin Munene Gituma [PW 7] and a girl.

That the marriage was peaceful save for normal minor differences like any other couple. That on the 23rd day of October, 2009 she spent her day at her salon, christened Mota, within Garden Estate in the company of Terry Wanjira Munyi [PW 4], Eunice Wanjiru and Teresia who were her employees. She left the salon about 8.00pm. Normally it would take about 15 minutes walk to her house. As a habit she carried along the day's collection, which on this day was shs. 27,000/- . That Garden Estate is sandwiched by two roads. The main tarmac road used by vehicles leads to a barrier manned by Ivory Security Guards and six Police officers. The back side road used mainly by pedestrians also leads to Garden Estate. Both roads link Kiambu Road and Thika Highway. This back side road is normally deserted. That on the fateful day she chose to use the said back side road. She saw two [2] men walking ahead of her. She caught up with them. They told her that they had been waiting for her. That they wanted to see her husband. All over sudden she saw another group of two men coming from behind. The first one had a gun. The second one paper bag. She was shocked. They then robbed her of the KSh. 27,000/-[the day's collection] and her mobile phone Nokia model 2630. Subsequently she was frog marched using the back side road to her house. She did not therefore pass through the main gate manned by Ivory Security Guards and six armed policemen. In essence she could not have been saved by the security personnel.

Though her compound had lockable gate the same was not locked since some pillars had sank leaving a wide gap. Thus they entered the compound without the necessity of someone opening the gate though she had keys to the gate.

She stopped when she reached the door as she was terrified of what would happen once inside. Her husband's cousin Beatrice [PW 9] saw her through the glass door of the living room. One of the assailants knocked the door and stepped aside. Then Beatrice opened the door. As soon as the door was opened the assailants pushed her inside and followed her in quick succession. There were three children in the sitting room, namely, Beth [PW 1], Kelvin [PW 7] and Beatrice [PW 9].

Once inside, the assailants ordered everybody to lie down. One of the assailants stepped on her son Kelvin [PW 7], and demanded his cell-phone. Kelvin had none. The other assailants demanded more money, Yet the other assailant was ransacking the pockets of the house girl Beth [PW 1] and Beatrice [PW 9]. In that way they managed to get the mobile phones from Beth [PW 1] and Beatrice [PW 9]. The assailants then picked them up one by one and bundled them in the toilet-cum-bathroom attached to the living room. One of the assailants kept vigil while the other three [3] went to the bedroom upstairs. She could hear rapid movements upstairs. The assailants were asking for her husband and were threatening

them with death if her husband did not show up. She pleaded with them for mercy. She was doing all this to protect the children who were in the house from harm. In the course of time she heard the assailant keeping vigil at the toilet-cum-bathroom saying on phone that the other assailants were on the way. That they had reached Thika. Still locked in the toilet-cum-bathroom, she heard her husband parking in the garage and walking upstairs to the bedroom. Suddenly, she heard screams. Then a struggle ensued upstairs. After the commotion upstairs the toilet-cum-bathroom door was opened. The assailant who was keeping vigil pulled her out and she landed at the door that leads to the stair - case. That is when she saw the body of her husband lying in a pool of blood. The assailant who had a gun ordered her to drive them to Thika using family motor vehicle, KAX 755J, Toyota Fortuner, which her husband had arrived in at 1.46 a.m. It was about 2.00am. She drove the said vehicle with the assailants as passengers up to the main gate. She stopped. The assailants demanded to know why she had stopped. She explained to them that she had to surrender the gate pass to the gate – man as a matter of procedure. The vehicle had tinted windows. The assailant then ordered her to open the window just enough to give the gate pass to the gate man. The assailant sitting on the co-driver's seat had a pen – knife. Three of the assailants at the back -seat pointed a gun at her neck. She surrendered the gate pass to the gate man but did not wait as usual for the details of the occupant and the vehicle to be recorded on the gate register [exhibit 3] She could not raise an alarm because she realized she could endanger her life. Having seen how they treated her husband she had no doubt that they could visit the same treatment on her.

She explained that this was not the first time the assailants had struck at their house. The first was in June, 2001. The other one was at her salon. She did not produce any police abstract or court proceedings regarding those incidences.

On reaching the main Thika-road the assailants ordered her to drive to Thika. When she reached Juja, they ordered her to stop the vehicle. At that juncture the assailants jumped out and disappeared into the darkness. She drove towards Thika instead of returning to Garden Estate with an intention of reporting the incident at Thika Police Station.

Once she reached Thika, she stopped at the first Petrol Station. The **G 4 S** Security Guard at the said Petrol Station took her to Thika Police Station where she made a report. One kind Police officer assisted her with a cell phone which she used to call a family friend by the name Mama Lucy Karimi on 0722 804 881. She informed her of the unfortunate incident.

She was admitted at Thika Nursing Home to be treated for shock. Mrs Kimuri and her husband, her sister – in- law, Winfred Karimi, her nephew Edwin and two policemen from Kasarani Police Station found her there. Mrs. Karimi drove her back to Nairobi in Motor Vehicle KAX 755G which she had used to drive the assailants to Juja.

On reaching Kasarani, S S P Katola instructed Mrs. Karimi to drive her straight home instead of reporting at Kasarani Police Station. She reached the house at about 10.00am. The police then generally questioned her about the incident. Later on she wrote a statement at Crime Prevention Unit. Subsequently she was charged with the offence of attempted murder. She later learnt that her husband had been discharged from Aga-khan Hospital while she was still in custody. After her release her husband was kept away from her by his [husband] family on allegation that she [Janet] was the one who organized the attempted murder.

On 2nd March, 2010 her husband passed on. Subsequently she was charged with the offence of murder. She denied the charge. By reason of the controversy surrounding the death of her husband, she decided to enlist the services of Dr Rogena [DW 2] at the stage of post mortem. She called Dr. Rogena who gave evidence as [DW 2].

DW2, Dr Emily Adhiambo Rogena, holds a Masters Degree in forensic medicine from the University of Dundee in Scotland, 1999. At the time she attended the autopsy she was a senior lecturer at the University of Nairobi undertaking atomic and forensic pathology. That study entails diagnosis of diseases using atomic changes. An example of atomic structure is the brain, lung or any organ of the body. Part of the tools for examining the disease is a post- mortem examination. Microscopy is also undertaken as a

tool of post mortem examination.

This exercise is meant to establish the cause of death or the extent of the disease and partly the mechanism of death. Her clients include the **living and the dead alike**.

In respect of this case her client was **dead**. She was requested by Janet Karamana Gituma [A 1] to stand in for her at the time of the post-mortem. Her brief was to find out, using her tools of trade, the cause of death of the deceased herein.

The post-mortem examination was conducted at the Aga-khan Teaching Hospital, Nairobi, on the 3rd day of March, 2010. There were three pathologists in attendance namely, Dr. Rogena (DW2), Dr. Jane Wasike Simiyu and a police pathologist deployed at Central Medical Laboratory attached to Ministry of Health. In addition there was a Dr. Indeche [PW 14]. Equally, present was a police Constable Benson Moenge attached to Parklands Police station and a family lawyer by the name Isaac Onyango, Mr Enock Awala of Central Bank of Kenya and George Kinoti a Security Officer at Central Bank of Kenya, was also in attendance.

The body was identified by Reuben Gituma and Fabian Gituma in the presence of Corporal Moenge. **It had a tag No. 503060.**

On examination she observed as the following salient points;-

- The body appeared generally pale.
- There was bleeding on the face, mouth and eyes.
- **She thus ruled out pressure to the neck or asphyxia i.e strangulation.**

Internally: General Muscle

There was wastage of body. Lose of weight which is shown by loss of muscle bulk, especially small muscles of the hand, and of the thighs and the legs.

Abdomen

The abdomen was markedly extended which could be associated with the enlargement of the organ or fluid within the abdomen cavity which could be gas liquid.

Rigomortis

- Was generalized and intense
- The lividity was fixed externally
- There were no sign of decomposition
- The body was thus well refrigerated

Signs of external injury

- There were several healed middle puncture works wounds on the right shoulder and the collar
- There was a large healed surgical scar behind the left ear.

Internally

- The loops of the intestine was held together by adhesive [like glue] and pockets of pus which was abnormal
- That was an indication of bacterial inflammation which was producing the pus.
- This triggered the body mechanism to produce the protein material which fixes the pus from where it was arising to wall it off or pocket it off.

- Both small and large bowel loops showed marked distention [gas within them meaning the bowel loops were not mobile as they should have been and hence maintained gas instead of releasing gas].
- The problem was compounded by the fact that the appendix area on the right side of the abdomen peritonium had a 60mm area of pus. The appendix was buried in pus.
- On the dissection, the appendix tissue was breaking into small pieces meaning that it was rotten.

The Digestive system

The abdomen

- The peritoneal cavity which houses the small and large intestine, the stomach, the liver, the gall bladder and the spleen contained one [1] litre of thick yellowish foul smelling pus which had extended to the pelvis with packets of inflammation. This was a reaction to the inflammatory process and the retention that may have been there.
- The problem was compounded by the fact that the stomach content consisted of 1.5 litres of undigested food – cabbages and faeces.
- This means there was an obstruction arising from the static manner in which the bowels were.
- Arising from the static manner of the bowels a situation arose where the indigested food and the faeces would move ***either way***, which would lead to the patient vomiting the faeces or passing the faeces through the anus.
- In addition, the lining of the stomach appeared to be eroded by some form of irritation or peptic ulcer.
- The liver was abnormal. It was weighing 1940gm with fatty changes. Ideally the liver of an adult should weigh between 1500 – 1700gm and should not be fatty. It was a sign either that the patient had severe infection or that he was taking a lot of alcohol or had metabolic disorder e.g diabetes or malnutrition.

Nervous system

- The skull had a healed fracture attached to the bones and also attached to the major membrane of brain.
- A piece of fractured bone appeared depressed. A depressed fracture would have caused injury to the brain.
- The brain did not show any signs of swelling
- Dissection of the brain revealed bleeding in the right lobe – the temporal and the parietal.
- On both lobes of the brain the grey matter appeared thinned down.
- The brain function was reduced. This means the patient/person lost muscle power i.e power of movement. ***This could cause death if it was the only finding.*** But in this case it was not the primary cause of death.

Respiratory system

The lungs showed marked carbon staining ***anthracosis*** with faeces consolidation or pneumonia consolidation on the right lower lobe. He could have been a smoker or he could have been exposed to outdoor/indoor pollution.

Opinion as to primary cause of death

Taking into consideration the clinical notes, the history of the patient and the post-mortem findings, the good doctor attributed death to ***acute peritonitis due to peri-appendicular abscess due to acute appendicitis.***

Secondary causes of death

Other conditions that could be attributable to the cause of death was the presence of diabetes mellitus

[absence of insulin] and also depressed right temporal fractures, right brain contusion with sclerosis [scar tissue formation].

The report was tendered in evidence as exhibit D 1.

DW3, Evans Obangi Otwor, [A2] was employed by M/s Ivory Security Guard Ltd as a watchman. He was deployed at the main gate at Garden Estate in the month of October 2009.

On the night of 23rd October, 2009 he reported on duty at 6.15pm. His shift extended upto morning. He found a colleague **Jared Omweno and John Mateori** [Supervisor to the guards] at the main gate. The three changed into Ivory Security Guards uniform in readiness for work. About 8.19 pm, motor vehicle registration number KBH 657J arrived at the gate of Garden Estate. As customary, the vehicles details and the occupants details are entered in the Register. He made the following entries in exhibit 3.

1. Full names - **Taxi**
2. Destination - **[overwrite Githea]**
3. Gate Pass No. - **022**
4. Time in - **20.19pm**
5. Time out - **20:17pm**

At about 1.46am on 24th October, 2009, a motor vehicle registration number KAX 755G arrived at the main gate of Garden Estate and he once again made the following entries:

1. Reg No: **KAX 755J**
2. Full name of occupant: **Mr. Gituma**
3. Destination: **Home**
4. Time in: **1.46am**
5. Gate Pass No: **255**

About 30 minutes later the same vehicle [read KAX 755J] returned to the gate from inside Garden Estate. He then made the following entries

1. Full names: **[blank]**
2. Destination: **[blank]**
3. Time out: **2.20 am**
4. Occupant: **[not indicated]**
5. Gate pass: **017 then crossed and overwrote 257**

About 2.40am on 24th October, 2009, two Ivory Security Guards on patrol and a young girl came to the gate. The girl was seeking for help. She claimed that her father was killed in the house and her mother was hijacked by the people who killed her father. That the assailants escaped in motor vehicle KAX 755J. In the company of Jared Omweno, the two guards who had accompanied the girl and some police officers who were on duty at Garden Estate visited the scene.

In the house they found Gituma [deceased] lying in a pool of blood on the stair -case. He had serious cut wounds on the head and other parts of the body. A vehicle belonging to a neighbour by the name Kimani arrived. They went upstairs with PC Kingori and picked the deceased. At 6.45 am he signed off without recording any statement and left the directors of Ivory Security firm to address other remaining issues.

On 30th October, 2009 Corporal Kiema and two other Police officers came to Garden Estate in three vehicles. They asked him to identify the vehicle that had entered, Garden Estate on 23rd October, 2009 at

20.19 hours. He identified motor vehicle registration number KBH 657J. Together with Jared Omweno, he was ordered to accompany the police officers to CID Headquarters.

The vehicle KBH 757J was detained at CID Headquarters while the two of them were locked up at Muthaiga Police Station. They were later charged with robbery with violence and attempted murder. Much later the offence of attempted murder was substituted with the one of murder once it was established that Moses Mbaabu Gituma [deceased] had passed on. He denied the charge.

DW4, Lawrence Kariuki Githinji, [A3], recalled that on the 6th day of November, 2009 a lady running a business at Kimunya market, by the name Wanjiru informed him that a police officer at Kimunya by the name Sgt Andrew Mocheno was looking for him. On his way to the said police station he met the said police officer who informed him that certain police officers from Nairobi were looking for him. The said Sgt Mocheno then led him to the police station. He heard him telling someone on phone that he had arrested him. He told Andrew Mocheno that he bought the phone from **Antony Muthii Mati** alias **Mugendi [A 6]** at Upper Hill Bar and Restaurant on 24th October, 2009. That he exchanged his **Nokia 2310** with Mugendi's **Nokia 2630**. In addition to giving Mugendi Nokia 2310 he also topped it by paying him [Mugendi] additional sh. 200/=. Even then there was still a balance of Sh, 200/- which he undertook to pay Mugendi at a later date.

That as a sign of transparency the transaction was reduced in writing as evidenced by **exhibit 7**, dated 24th October, 2009, and witnessed by Jackson Gatimu Muthamu [cell phone No. 0723 711 112] and James Kimathi [cell phone No. 0712 181 544]. Mugendi told him that he would retain the original agreement. That on payment of the balance of shs. 200/- Mugendi [A 6] would give him the agreement through James Kimathi the witness.

Subsequently, on 6th November 2009, he was arrested and charged with the offence of attempted murder and handling stolen property which was later substituted with one of murder. He put forward an **alibi** that on the 23rd of October 2009 when it is alleged that he murdered the deceased, he was at home within Kimunya several miles away from Garden Estate. He denied the charge.

DW5, Clement Munyao Katiku, [A4], in his sworn statement, testified that he owns a bar christened **Munyao Pub**, at 42 Kibera Estate, and is also an employee of Kenyatta National Hospital, in the capacity of a casual labourer. His personal number is **314316**.

That his bar-maid and some customers were arrested on 27th September, 2009. To bail them out the police required a sum of sh. 5000/-. He did not have enough money so he approached, **inter-alia**, Virginia [PW2] who loaned him a sum of sh. 1000/=. As consideration of the said loan he pledged his Nokia model 1200 to Virginia.

On 30th October, 2009 he went to Kileleshwa to see his cousin, Christopher Munyao. He met Mark Makau Mathaa [DW8]. He asked Mark if he could take up a job at a canteen belonging to his boss at Kenyatta National Hospital. Mark declined and in turn called Andrew Muua Kimomo who accepted the offer.

However, in order to be employed, at the canteen, Andrew Muua Kimomo [A5] had to get a health certificate at a cost of sh. 2400/=. Andrew had only sh. 1700/=. He loaned Andrew sh. 700/= to make a grand total of sh. 2400/=. In consideration of a loan of sh. 700/= Andrew pledged to him Nokia model 1200. However, when he came to court he was charged with the offence of theft of Nokia 6300. He denied the charge.

DW6, Florence Nduki Mutiso, an employee of Kenyatta National Hospital since 1981 is the head of Human Resources. She maintains records of all employees. She categorically testified that the code for Kenyatta National Hospital starts with **52 or 53**. She confirmed that the said hospital does not have personal number **314316**. She denied that Clement Munyao Katiku [A4] was an employee of Kenyatta National Hospital at any given time. That personal number **314316** is fake. She further testified that casual workers were not given personal numbers hence Clement Munyao Katiku was an imposter. She

totally disowned Clement Munyao Katiku [A4] and branded him a liar.

DW7, Andrew Muua Kimomo, [A5], testified on oath that on 30th October, 2009, his friend Mark Makau Mathaa [DW8] alerted him of a job opportunity at a salary of sh. 9,900/= per month. He declined the offer.

About 7.00 a.m. John Mutie informed him that Simon Soldier Thitu had accepted the offer. He then took Simon to Kileleshwa, Othaya Road, where Mark Makau Mathaa [DW8] was working. At the gate they were joined by a lady called Mary. After a briefing by Mark Makau Mathaa they proceeded to Kenyatta National Hospital, to obtain a health certificate which was a pre-requisite for getting employment.

At the gate of the said hospital a **foreman** going by the name **Baba Freddie** borrowed his cell-phone Nokia model 2310, with sim card No. 0725-121-682, to talk to the doctor issuing the health certificate.

Then the foreman suggested to go inside the hospital with Mary first. He remained with Simon. But neither Mary nor the foreman returned. After a long wait he went inside the hospital to trace Mary and the foreman. The search drew a blank. He went back to the gate where he had left Simon Soldier Thitu. At that juncture Mark Makau Mathaa [DW8] called Simon Soldier Thitu to enquire whether they were successful. Simon explained to Mark how the foreman, Baba Freddie, had played a trick on them and stole the cell-phone of Andrew [A5]. Mark advised them to go away since it was already late.

At 4.00 p.m, in the company of Simon Soldier Thitu, he went to see Mark Makau Mathaa. Mark was preparing to go to Ukambani being end of month. He told Mark about the loss of his phone to the foreman, Baba Freddie.

On 7th November, 2009 he went to replace his sim card No. 0725-121-682 at Safaricom Retail Shop at Kawangware, Route 56. He was asked for a receipt. He went back to retrieve the receipt for his Nokia model 2310 to take to the police to issue him with an abstract. This was necessary to facilitate the tracing of his said cell-phone. The police demanded sh. 1500/= to assist. Since he did not have that amount of money he dropped the idea.

On the 21st day of December, 2009 when at work, in Yaya Center, two people introduced themselves to him as CID officers. He was arrested and taken to a police vehicle parked nearby. Inside the said vehicle he found Mark Makau Mathaa in handcuffs. Together they were taken to Kilimani Police Station where they were locked in cells. Inside the cells he found the foreman, Baba Freddie, who fled on recognizing him.

On 22nd December, 2009, in the company of Mark Makau Mathaa he was taken to Nairobi Area CID where he wrote a statement. When they went back to the police station Mark Makau Mathaa was released. He was arraigned in court jointly with others for the offence of attempted of murder which was later substituted with one of murder. He denied the charge.

DW8, Mark Makau Mathaa, a day security guard for the Charlsons for 22 years recalled the events of 30th October, 2009 at Othaya Road.

As soon as his employer [Charlson] left, a stranger came to the gate and asked for the security guard. He owned up. The stranger told him that he was working with the UN and could assist someone to get a job with UN at a salary of shs. 9900/- house allowance, food and cooking fat and 6 packets of unga.

He then rang Andrew Muua Kimomo [A5] who said he was not interested. Subsequently he rang John Mutie who said he could get someone. Two hours later Andrew Muua Kimomo came with Simon Soldier Thitu at Charlson's gate. Unfortunately, Charlson abruptly returned. He went inside the compound to attend to Charlson. When he returned he did not find them.

About 2.30pm John Mutie called him and enquired if he knew the man claiming to be UN personnel well. John Mutie told him that they had gone to Kenyatta National Hospital with the UN man but he [UN

man] disappeared inside the hospital compound. To make it worse the UN man took his cell phone and sh. 1500/-. He had knowledge that Andrew Muua Kimomo's phone was a Nokia 2310 and sim card was number 0725 121 682. Later on he was arrested by the police and asked to take them to Andrew Muua Kimomo. Incidentally he found the stranger who claimed he was UN personnel at the police cells. He confirmed that the cell phone Nokia 2310 belonged to Andrew Muua Kimomo. That Andrew [A5] said that phone was pledged as security for a loan of sh. 2500/= to be paid by Clement [A4] on behalf of Andrew [A5] for medical certificate.

DW9, Anthony Muthii Mati, [A6], in his sworn evidence testified that on 25th October, 2009 on his way to Kirinyaga he met Peter [A7] at Githurai stage at 11.00 a.m. He demanded that Peter [A7] pay his debt of sh. 3000/=. Peter retorted that he no money. He [A6] then told him to leave him with his cell-phone as security for the loan. The phone was Nokia 2630 -**exhibit No. 6**. On 22nd February, 2009 he sold the said phone to Lawrence Kariuki [A3].

DW10, Peter Maina Kibe, [A7], in his sworn statement testified that he owed Mugendi [A6] a sum of sh. 3500/=. Mugendi insisted that they put in writing the mode of payment of the debt. Towards that end, an agreement was recorded to the effect that he would re-pay at the rate of sh. 500/= every week on a Friday.

About the month of December, 2009, despite the agreement, Mugendi demanded the entire outstanding amount being sh. 3000/=. He told Peter that the police were looking for him in respect of undisclosed offence.

On 17th January, 2010 some policemen accosted him at Roysambu, Route 44, stage. He was taken to Kasarani Police Station where he found Mugendi [A6] in a Subaru vehicle. Mugendi informed the police that he was the one who sold him Nokia 2630 [exhibit 6]. Both of them were arrested and arraigned in court and charged jointly with assault and bodily harm, handling stolen property and attempted murder of the deceased.

About February, 2010 the initial charge aforesaid was substituted with one of murder. He denied the charged.

The case against the accused persons herein is based on circumstantial evidence.

I am alive to the law that in order to justify, circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis other than that of his guilt. There there must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts justifying the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remain with the prosecution. That it is a burden, which never shifts to the party accused. In this regard, I call in aid the authority of **SAWE VS REPUBLIC [2003] KLR Page 364 at 372.**

I am equally aware that circumstantial evidence is very often the best. It is the evidence of surrounding circumstances which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. In this regard I call in aid the authority of **REPUBLIC VS TAYLOR WEAVER & DONOVAN [1928], 21, CR. APP. R 20.**

Applying the aforesaid principles to the facts of this case, the prosecution pieced together and presented before me, as circumstantial evidence, the following facts.

1. That Janet Karamana Gituma [A1] was at all material times the wife to the deceased herein. The marriage was blessed with two (2) issues – a boy and a girl.
2. Janet had a salon business christened **Mota** within Garden Estate.
3. That her car was parked behind the said salon on the fateful night. There is no evidence or indication that the car was not in good mechanical order.
4. Though it was late-about 8.00 pm-Janet chose not to use her car [see evidence of PW4 and that of

- Janet [A1].
5. A client she served last, one Rebecca Njeri Karanja [PW12], volunteered to drive her home but she excused herself. In doing so she explained that she was waiting for a **fundu** to do repair works at the salon. By the time PW12 left [about 7.40 pm] it was already dark but the **fundu** had not arrived. The excuse that she was waiting for a **fundu** was thus **a red-herring**.
 6. In her defence she does not say whether the **fundu** came and undertook the repair works though it was dark – 7.45 pm. Equally she does not name the **fundu** to enable the court to summon him under section 150 of the Criminal Procedure Code to shed light on that important aspect of the evidence.
 7. Though it was dark already she chose to take a backside deserted road instead of the main road leading to the barrier guarded by Ivory Security Guards and six (6) police officers.
 8. In the course of her journey she saw two men walking ahead of her on this deserted road.
 9. Instead of turning back to flee she chose to proceed and catch up with them.
 10. Then suddenly two (2) other men appeared from behind.
 11. One was armed with a gun and yet another was holding a paper bag containing something.
 12. **The four (4) men then robbed her, inter-alia, of her cell-phone – Nokia model 2630 – and the day's collection of 27,000/=.**
 13. The four (4) assailants ordered her to lead them to her house thereby implying they did not know the location of her house within Garden Estate.
 14. She led them to her house with full knowledge of the dangers looming.
 15. When she reached the front door, she knocked. On identifying her, through the glass door, Beatrice [PW9] opened the main door.
 16. The four (4) assailants then pushed her inside the living room and followed her inside in quick succession.
 17. Once inside the house the four (4) assailants assaulted Beth Wairimu [PW1] Kelvin [PW7] and Beatrice (PW9) and took possession of the cell phone of PW1 and PW9.
 18. The four (4) assailants then unleashed terror on them – slapped and bundled them in the toilet-cum-bathroom attached to the living room.
 19. Beth Wairimu [PW1], Kelvin [PW7] and Beatrice Gaicugi [PW9] were told to lie down on the floor. However, Janet [A1] was allowed to sit on top of the toilet cover.
 20. The four (4) assailants then ordered Beth Wairimu [PW1], Kelvin [PW7] and Beatrice [PW9] to remove their clothes. Janet [A1] was exempted from removing her clothes.
 21. Janet interceded on behalf of Beth, Kelvin and Beatrice and the assailant keeping vigil on them dropped the idea.
 22. At one stage the assailant keeping vigil on Beth, Kelvin and Beatrice threatened to shoot them but once again Janet [A1] prevailed upon him not to do so.
 23. The incidences where Janet [A1] prevailed upon the assailants not to harm Beth, Kelvin and Beatrice is evidence of Janet [A1] having good rapport with the assailants. They seemed to listen to her.
 24. Once the four (4) assailants had completed their mission – hacking the deceased – they came to the toilet-cum-bathroom and informed Janet [A1] that they had finished their job [**See evidence of PW9 -Beatrice Gaicugi**].
 25. The four (4) assailants, upon accomplishing their mission, then asked Janet [A1] to drive them away. She obliged.
 26. Janet surrendered the gate pass **No. 255** at the main gate. But Evans [A2] wrote in the gate register [exhibit 3] gate pass **No. 257**.
 27. Janet drove the four (4) gangsters past the main gate manned by Ivory Security Guards and six (6) police officers without raising an alarm or creating a scene, thereby missing the best opportunity to have the assailants arrested.
 28. Even after passing the main gate, which posed a problem to the assailants, because of presence of security officers, Janet still drove them up to Juja, where on the evidence, they disappeared in thin air.
 29. Instead of turning back to Garden Estate when the assailants had alighted, to take her husband to hospital, Janet [A1] drove from Juja to Thika after 2.00 am purportedly to report the incident yet **Juja was the nearest police station**.
 30. Janet [A1] had been robbed, her family harassed and her husband hacked [apparently almost

- dying] yet she had all the strength and courage to drive alone from Garden Estate after 2.00 am up to Thika **instead of turning back at Juja to rescue her husband.**
31. On reaching Thika, Janet [A1] abandoned the family motor vehicle, KAX 755J, at a petrol station and reported the incident to Thika Police Station in the company of a petrol attendant.
 32. From Thika Police Station Janet [A1] booked herself at Thika Nursing Home to be treated for shock. Incidentally she was treated for shock but only started vomiting and shaking when she returned to her house at Garden Estate at 10.00 a.m.
 33. The shock treatment at Thika Nursing Home took a short time. Then she rang Mrs. Karimi [using a cell-phone of a good Samaritan police man] to come for her in Thika. She could not drive herself even after the shock treatment in the morning of 24th October, 2009 but could drive from Garden Estate to Juja, with gangsters on board, in the wee hours of the night of 24th October, 2009.
 34. Mrs. Karimi drove her back from Thika to Garden Estate. The police disbelieved her story, of the events of the fateful night, and charged her with six (6) others with the offence of attempted murder which later graduated to full murder after the death of her husband-Gituma.

In respect of Evans Obangi Otworu [A2] the prosecution pieced together and presented before me, as circumstantial evidence, facts linking him [A2] with Janet [A1] and amounting to a conspiracy to sneak the four gangsters into Garden Estate, which culminated in the robbery at the Gituma's. The conspiracy theory was presented thus:

1. Almost about the same time [8.00 p.m on 23rd October, 2009] when Janet [A1] was walking on a back-side road towards Garden Estate and is accosted by four (4) gangsters, Evans Obangi Otworu, an employee of Ivory Security Guards Ltd. manning Garden Estate was making entries of arrival of a vehicle bearing registration No. KBH 657J Toyota Salon, with several occupants in gate register **[exhibit 3]**.

2. The entry read as follows:

- (a) **Full name:** Taxi
- (b) **Destination:** **Githea**
- (c) **Gate pass:** 022
- (d) **Time in:** 20.19 hours
- (e) **Time out:** 20.17 hours

3. In the course of giving evidence he claimed that Jared Omweno made the entry of time out [20.17] hours and undertook to call Jared Omweno to prove this fact. He later abandoned the idea.

4. This entry by Evans [A2] is weired by reason of the fact that:

- (a) The name of the driver of the taxi is omitted contrary to the procedure and practice used in filling Exhibit 3.
- (b) The destination has overwriting to read **GITHEA**.
- (c) **Githea** denied that the vehicle KBH 657J went to his compound.
- (d) Githea told Cpl. Amos Gichuki (PW20) that vehicle KBH 657J did not go to his compound at 20.19 hours and left at 20.17 hours on 23rd October, 2009 or at all.
- (e) **If the vehicle registration No. KBH 657J did not go to Githea's compound then where did it go?**

(f) The vehicle registration No. KBH 657J arrived at 20.19 hours and left at 20.17 hours. It left before it arrived.

(g) **The number plate KBH 657J is fake [see evidence PW5 and 6].**

5. **This vehicle registration No. KBH 657J, on the circumstantial evidence, is the one which ferried the assailants and Janet [A1] to Garden Estate.** In this regard see the evidence of Julius Chege Muiruri [PW5], Michael Ndimi Kariuki [PW6] and Cpl. Amos Gichuki (PW20).

6. At about 1.46 a.m on 24th October, 2009 it once again Evans Obang Otworu who made entries in exhibit 3 relating to the arrival at Garden Estate of Moses Mbabu Gituma, the deceased. The entries relating to Gituma incidentally is complete and accurate:

- Reg. No: **KAX 755G**
- Driver's name: **Gituma**
- Destination: **Home**
- Time in: **1.46 a.m**
- Time out: **2.20 a.m.**
- Gate pass: **255**

7. The question that begs an answer is why all other entries are accurate save those that relate to motor vehicle registration No. KBH 657J and KAX 755G.

8. Thirty four (34) minutes later the same vehicle (KAX 755G) again left Garden Estate but the details of the driver (who is not Gituma) is not entered in exhibit 3.

9. Gituma (deceased) went home with gate pass No. 255. Thirty four minutes later Janet [A1] came back driving the same car and surrendered gate pass No. 257. It does not add up. The question to pose is this: When did the number of gate pass change?

10. By coincidence it is the same Evans Obong Otworu [A2] who once again made the entries of the departure of KAX 255 in exhibit 3.

11. Evans Obong Otworu [A2] admits in his defence that he was on a night shift on the night of 23rd/24th October, 2009 in the company of **Jared Omweno**, and John Mateori.

12. John Mateori equally a colleague, did not make the questionable entries.

13. It is telling that only Evans Obong Otworu [A2] made entries relating to **entry** and **exit** of motor vehicle reg. No. KBH 657J, and KAX 755J. Quite a coincidence. Yet his other colleagues were present.

14. Flowing from the evidence herein above, Evans [A2] is thus an accessory before and after the fact. **Hence a principal offender.**

15. Evans [A2] is economical with the truth. Hence unreliable witness.

In respect of Lawrence Kariuki [A3] the prosecution pieced together evidence of the purchase of Nokia model 2630 stolen from Janet [A1] on the 23rd day of October, 2009. This was on the back side road leading to Garden Estate when she also lost sh. 27,000/= to the assailants. The assailants then frog-marched her to Gituma's residence and ultimately robbed members of her family and maimed Gituma who subsequently passed on. The facts presented, as circumstantial evidence, include but are not limited to the following:

1. On 24th October, 2009 Lawrence Kariuki exchanged his Nokia model 2310 with Nokia model 2360 which Muthii Mati alias Mugendi [A6] held out as belonging to him.

2. In addition to giving Anthony Muthii Mati [A6] his Nokia model 2310 he also added on top sh. 200/=. Even then there was still a balance of sh. 200/= to be paid to Anthony Muthii Mati [A6] at a later date. Then and only then would the original agreement be surrendered.

3. As a sign of transparency the transaction was reduced in writing as evidenced by exhibit 7, dated 24th October, 2009 and witnessed by James Kimathi [cell phone No. 0712-181-544] and Jackson Gituma Mathew [cell phone No. 0723-711-112]. Anthony Muthii Mati alias Mugendi [A6] retained the original agreement pending the payment of the balance of sh. 200/=. Upon payment of the balance of sh. 200/= the original agreement would then be passed over to Lawrence Kariuki [A3] through James Kimathi.

4. Lawrence Kariuki defence, in a nutshell, is that he was a mere purchaser for value without notice of the defect in title. In the circumstances he was innocent.

In respect of Clement Munyao Katiku [A4] the prosecution pieced together certain facts, as circumstantial evidence, connecting him with possession of Nokia model 1208 [exhibit No.1] stolen from Beth (PW1) on 23/24th October, 2009. The said facts relied upon were presented thus:

1. During the robbery at the Gituma's the house girl by the name Beth Wairimu Ndegwa [PW1] lost, to the assailants, cell phone Nokia model 1208.

2. In the course of the investigations the said cell-phone was found in the possession of Justus Mutinda Ndeko [PW3].

3. On interrogation Justus Mutinda Ndeko confirmed, that he had obtained the same from Virginia Mutheu Nzomo [PW2].

4. When the police confronted Virginia Mutheu Nzomo [PW2] she confessed that she had obtained the said cell-phone from Clement Munyao Katiku [A4].

5. Virginia [PW2] explained to the police that Clement Munyao Katiku [A4], a neighbour, had pledged the cell-phone Nokia model 1208 to her in consideration of Virginia granting him a loan of sh. 1000/= in the month of October, 2009

6. That two (2) weeks later the child of Virginia Mutheu Nzomo [PW2] fell sick.

7. Virginia Mutheu Nzomo [PW2] then obtained a loan from Justus Mutinda Ndeko [PW3]. As security Virginia Mutheu Nzomo [PW3] pledged cell- phone Nokia 1208 [exhibit No. 1] to Justus Mutinda Ndeko [PW3].

8. On 13th January, 2009, Justus Mutinda Ndeko [PW3] was using exhibit No.1 while working at a building site on Mombasa Road when one Samson Malanga Malambi called him on the said handset. As he [Mutinda] was talking, CID officers accosted him. They demanded to know how he came into possession of exhibit No. 1 – Nokia model 1208.

9. Justus Mutinda [PW3] explained that he had obtained the same from Virginia Mutheu Nzomo [PW2]. Mutinda then led the CID officers to the house of Virginia Mutheu Nzomo. Virginia in turn led the police to arrest Clement Munyao Katiku [A4].

10. *The sequence of events puts into focus the doctrine of recent possession.*

11. In his defence Clement Munyao Katiku [A4] testified that Andrew Muua Kimomo [A5] borrowed from him sh. 700/=. In consideration thereof Andrew pledged cell phone Nokia 6300. However, on arrest he was charged with theft of Nokia 1208 stolen from Beth Wairimu Ndegwa [PW1] on the night of 23rd/24th October 2009. He denied the charge.

12. Clement Munyao Katiku denied ownership of Nokia 1208 [exhibit 1].

13. Notwithstanding his denial the circumstantial evidence points squarely at him and places him at the scene of crime.

In respect of Andrew Muua Kimomo [A5] the prosecution pieced together facts, as circumstantial evidence, relating to possession of Nokia model 1208, which happened to have been stolen from Beth Wairimu Ndegwa [PW1] on the night of 23rd October, 2009. The facts were presented thus:

1. Andrew Muua Kimomo borrowed from Clement Munyao Katiku sh. 700/=. In consideration thereof Andrew Muua Kimomo pledged to Clement Munyao Katiku a Nokia cell-phone model 1200, which on the evidence, turned out to be Nokia model 1208 stolen from Beth Wairimu Ndegwa [PW1] on the night of 23rd/24th October, 2009 at the premises of the deceased.
2. **Possession of Nokia model 1208 brings into focus the doctrine of recent possession.**
3. **Accordingly, this piece of evidence places Clement Munyao Katiku at the scene of crime – Gituma's residence on the night of 23/24th October, 2009.**

In respect of Anthony Muthii Mati alias Mugendi [A6] the prosecution pieced together certain facts, as circumstantial evidence, relating to possession of Nokia 2630 belonging to Janet [A1]. The facts relied upon were presented before me thus:

1. That on the 24th day of October, 2009 at Upper Hill Restaurant, Kimunya, within Kirinyaga, Anthony Muthii Mati [A6] sold to Lawrence Kariuki Githinji [A3] Nokia model 2630.
2. The said cell phone had been stolen from Janet Karamana Gituma [A1] on the night of 23rd October, 2009 along a back side road leading to Garden Estate.
3. Anthony Muthii Mati [A6] sold the same to Lawrence [A3] on 24th October, 2009.
4. As evidence of the transaction Lawrence Kariuki Githinji [A3] produced an agreement [exhibit 7] dated 24th October, 2009.
5. **That piece of evidence brings into focus the doctrine of recent possession.**
6. **Accordingly, that piece of evidence places Anthony Muthii Mati alias Mugendi [A6] at the scene of crime -Gituma's residence on the night of 23rd October, 2009.**

In respect of Peter Maina Kibe [A7] the prosecution pieced together certain facts, as circumstantial evidence, relating to possession of Nokia 2630 belonging to Janet [A1]. The facts were presented before me thus:

1. When Janet [A1] was arrested and interrogated she informed the police that her cell-phone phone Nokia 2630 [exhibit 6] [IMEI-357691/01/463181/1] was stolen by the assailants who raided her home on the night of 23rd/24th October, 2009.

2. The police then requested EMS Safaricom Ltd. to trace the frequency of Nokia 2630 serial number [exhibit 6] 357691/01/463181/1

3. Eventually the said cell-phone was traced at Kimunya within Kirinyaga. 4. The user was established as Lawrence Kariuki Githinji [A3].

5. On arrest Lawrence Kariuki Githinji [A3] informed the police that he had bought it from Anthony Muthii Mati alias Mugendi [A6].

6. On arrest and upon interrogation, Anthony Muthii Mati [A6] explained that he obtained the phone from Peter Maina Kibe [A7] a fellow tout at Githurai Kimbo on the morning of 24th October, 2009, which coincided with the time the deceased was attacked and seriously injured.

7 No. 51160 Cpl. Amos Gichuki [PW20] established that Anthony Muthii Mati alias Mugendi [A6] and Peter Maina Kibe [A7] were not only friends but work-mates – matatu touts at Githurai Kimbo.

8. On the one hand, Anthony Muthii Mati [A6] claimed that he obtained the phone from Peter Maina Kibe [A7]. On the other hand, Peter Maina Kibe [A7] denied possession of the phone. It

was a blame game.

9. Not being satisfied by the explanation offered regarding possession of the Nokia 2630, CPL Amos Gichuki [PW 20] then charged both accused 6 and accused 7.

10. **Possession of Nokia 2360 brings into focus the doctrine of recent possession.**

11. **Possession of Nokia 2630 [exhibit 6] placed both accused 6 and 7 at the scene of the crime on the night of 23rd/24th October, 2009.**

On the available evidence, it is clear to me that Janet [A 1] was at her salon christened Mota, within Garden Estate, on the 23rd day of October 2009. She was in the company of a salonist – employee -Terry Wanjira Munyi [PW 4]. In the evening, before PW 4 left for home, she confided in her [PW4] that she would either walk or drive home, to Garden Estate which was about, 2 km away. On her [Janet's] evidence it would take 15 minutes to reach her house on foot.

Almost the same time she told one of her customers, by the name Rebecca Njeri Karanja [PW 12] at about 6.20 pm, that she was waiting for a **fundi** to undertake some repair works. The excuse that she was waiting for a fundi, on the evidence, turns out to be a **red-herring**.

About 6.30pm Janet [A 1] closed her salon. However, she left the salon about 8.00pm and carried away the days collection of 27,000/=. Garden Estate is serviced by two roads. **One**, main tarmac road, that leads to the barrier manned by Ivory Security Guards and six armed policemen . **Two**, the back side road used by pedestrians [PW7], which is normally deserted, and is not manned by security at all.

She chose to use the back side road only on this occasion instead of the main road that leads to the main barrier which is guarded by security. As they say choices have consequences.

It was her evidence that she saw two men walking ahead of her. She caught up with them. All over sudden two others came from behind. One of them had a gun, another had a handbag. Yet another had a paper bag. They told her that they were going to her house. She was robbed of Ksh. 27,000/-, necklace, a ring and mobile phone Nokia model 2630. She then led them to her house. On the way they were making enquiries about her husband.

The gate to her compound, on her evidence, was not lockable hence she passed easily with her entourage. **This is disputed by PW9 who was categorical that the gate was lockable.** That Janet, deceased and house girl had the keys to the gate of the compound.

On reaching the main door of her house, she was horrified when one of the assailants knocked the door and stood aside. When the door opened one of the assailants pushed her inside and all of them quickly followed her in quick succession. Inside the living room the assailants terrorized them-accused 1, PW1, PW7 and PW9.

The assailants ordered them to lie down. They demanded Shs. 3 million. They specifically enquired when Gituma [deceased] would return home.

By coincidence, almost the same time Janet Karamana Gituma [A1] was hijacked by the said assailants, who frog-marched her to the house, Evans Obangi Otworu [A 2], an employee of Ivory Security Guards Ltd, was recording in the gate register [exhibit 3], at Garden Estate the following entries relating to arrival of motor vehicle registration KBH 657J Toyota saloon, at the main gate with some occupants on board.

1. Full name: **Taxi**
2. Destination: **Githea**
3. Gate pass No: **022**
4. Time inn: **20.19hours**

5. Time out: **20.17 hours**

This entry which coincided with the hijacking of Janet [A1], is weird because it omits the name of the driver of the taxi, has overwriting reading **GITHEA** but most significantly is the entry time out [20.17] hours and time in [20.19] hours. It is significant that the vehicle strangely came in [20.19 hours] before it came out [20.17hours]. This piece of the evidence is particularly telling. The anomaly is too good to be true. Most importantly **Githea** denied receiving visitors in motor vehicle KBH 657, in his compound. In this regard the evidence of Cpl. Amos Gichuki (PW20) is worthy of note.

On evaluation of circumstantial evidence, I find as a fact, that this mysterious motor vehicle bearing fake number plate KBH 657J was the one Janet [A1] came in together with the four [4] assailants, who later maimed her husband leading to complications which eventually lead to his demise. It is inconceivable that the omission in respect of the entry of the said vehicle details was innocent given that there was no similar omission in respect of the time the deceased arrived home and the time the deceased vehicle left with the assailants, with Janet [A1] at the wheels, at 2.20 a.m on 24th October. 2009. This crystallizes the conspiracy theory between Janet [A1] and Evans [A2].

On circumstantial evidence it is clear to me that having come with the assailants in motor vehicle bearing fake number plate KBH 657J, which left immediately, she gave the assailants access into her compound. Beth [PW1] opened the door and the assailants all entered. Janet [A1] then remained in the sitting room for sometime with one of the assailants as the rest of them-[PW1], [PW 7] and [PW9]-were bundled into the toilet-cum-bathroom. The assailants, on the evidence, treated her with kid gloves. This is telling. Further, Janet restrained the assailants from harming or mistreating PW 1, PW 7 and PW 9 on several occasions while the assailants were laying in wait for the deceased. This is evidence of the good rapport she had with the assailants. It is equally telling.

After viciously hacking the deceased, one of the assailants came from the bedroom upstairs. This assailant informed Janet [A1] that **they had finished the job** [see the evidence of PW 9]. The four assailants then left with the car belonging to the deceased with Janet [A 1] at the wheels. The deceased had come home in the same car about 1.46 am and had been given gate pass No. 255. Thirty four minutes later the same car was again leaving Garden Estate with Janet at the wheels. **The gate pass surrendered is 257**. This does not add up because it should be the same gate pass 255 which had been given to Gituma at 1.46 am. Once again Evans [A2] omitted vital details of the car and the occupants. In particular he missed to enter the name of the driver who was Janet [A1]. Not to mention the anomaly that the gate pass surrendered was 257 **instead** of 255.

It is worth repeating that there are several coincidences linking Evans Obangi Otwori [A2], with Janet [A1], and the events leading to the robbery and escape of the assailants on the fateful night, that lend credence to the conspiracy theory. The following are mere instances.

[i] Almost the same time that Janet [A1] is hijacked by four assailants on a back side road on her way home, Evans is making entries of arrival of a **taxi** into Garden Estate at 20.19 hours [in] and 20.17 hours [out]. The name of the driver of the taxi is omitted. Destination is altered to read Githea by overwriting. Githea denies ever receiving the said vehicle in his compound. [See the evidence of Cpl. Amos Gichuki [PW20].

[ii] At 1.46 am Evans Obangi Otwori is the one who made entries relating to the arrival of Moses Mbaabu Gituma [deceased]. This time round he was accurate. The gate pass is No. 255.

[III] Thirty four (34) minutes later motor vehicle reg. No. KAX 755J in which the deceased came in again left Garden Estate, this time with Janet [A 1] at the wheels. No details of the driver or occupants is entered. The gate pass number has an overwriting of **257** (See exhibit 3).

[iv] The question that begs answer is this: why omissions and alterations in respect of motor vehicle reg. No. KBJ 657J and reg. No. KAX 755J as opposed to the rest?

Yet it is in evidence that apart from Evans Obangi Otworu [A 2] there were also two other Ivory Security Guard on duty, by the name, Jared Omweno and John Mateori. However, Jared Omweno and John Mateori were not involved in making these questionable entries. Given the chain of events, and the way they are linked, I am persuaded, and find as a fact, that Janet [A 1] conspired jointly with Evans [A 2] to sneak in the assailants in Garden Estate, using motor vehicle with **fake registration number plate KBH 657J**, on the night of 23rd October, 2009. Time in [20.19] time out [20.17] is telling. Both of them knew that the cargo on board were robbers.

I am equally persuaded, and find as a fact, that Evans Obangi Otworu [A2] also conveniently and by design falsified certain entries into the gate register. [exhibit 3]. I find as a fact that when Janet [A1] left in motor vehicle registration No. KAX 755J, belonging to the deceased, Evans [A2] knew that Janet [A 1] was leaving with the assailants as cargo on board. The overwriting on gate pass [257] and omission of occupants and driver is telling.

I had the advantage of assessing Janet [A 1] in the witness box. She struck me as a person who is extremely cunning. As the revered writer **Shakespeare** would put it, **“she is cunning past man's wits”**. She is cold hearted and a schemer per excellence.

I equally had the advantage of assessing Evans [A2] in the witness box. He struck me as a person who is economical with the truth.

During the attack at the Gituma's their house girl, Beth Wairimu [PW1] lost her cell phone Nokia exhibit No. 1. This same cell phone was, during the investigation, found in possession of Justus Mutinda [PW 3]. On interrogation, Justus Mutinda informed the police that he had obtained the same from Virginia Mutheu Nzomo [PW 2]. When the police confronted PW 2, she confessed that the cellphone was given to her by Clement Munyao Katiku [A4]. That Clement Munyao Katiku [A4], a neighbour, pledged to her exhibit No. 1 in consideration of Clement Munyao Katiku [A 4] obtaining a loan of shs. 1000/- from her. This was during the month of October, 2009. Two weeks later, the child of Virginia Mutheu Nzomo, [PW 2] fell sick. Virginia [PW2] then obtained a loan from Justus Mutinda [PW 3]. As security, Virginia Mutheu Nzomo [PW 2] pledged exhibit 1 to Justus Mutinda [PW 3].

Justus Mutinda [PW3] was using exhibit 1 on 13th January, 2010, while working at a building site on Mombasa road, when one Samson Malanga Malambi called him. He received the call on exhibit 1. As they were talking, CID officers confronted him [PW 3] and demanded to know the ownership of exhibit 1. Justus Mutinda explained to the said policemen that he got the cell phone from Virginia Mutheu Nzomo. Virginia Mutheu Nzomo was then arrested. Virginia then led the police to arrest Clement Munyao Katiku [A 4] who had pledged the phone to her in consideration of a loan of shs. 1000/-.

I find as a matter of law that the above enumerated chain of events lends credence to the doctrine of recent possession.

In his sworn defence, Clement Munyao Katiku [A4], testified that he lent Andrew Muua Kimomo a sum of sh. 700/=. As a consideration thereof Andrew Muua Kimomo pledged his cell-phone Nokia model 1208 which turns out, on the evidence, to be exhibit No. 1 stolen from Beth [PW1] on the night of 23rd October, 2009.

I had the advantage of assessing the demeanour of Clement Munyao Katiku [A4]. He struck me as a person who is economical with the truth.

Going by his demeanor and inclination, I do not believe his defence. I reject the same. Having done so, I find as a fact that he was among the assailants who stole Nokia model 1208 from Beth [PW1] on the night of the attack at Gituma's. This places him [A4] at the scene of crime and brings into focus the doctrine of recent possession.

As to how he [A4] obtained the cell-phone, Nokia 1208 [exhibit 1] is a fact within his special knowledge. He has not offered a plausible explanation of how he came by it. It is a burden put squarely on him

courtesy of section III(I) of the Evidence Act [Cap 80] Laws of Kenya. He has not discharged that burden. In doing so I have not lost sight of section III(2) of the Evidence Act [Cap 80] Laws of Kenya which does not lessen the duty on the prosecution to prove its case beyond any reasonable doubt.

No. 66771 CPI Moses Kiama [PW7], the initial investigating officer in this case, caused to be arrested Janet [A1] after taking her statement under enquiry. He was convinced that Janet [A1] had information that could assist the police in unraveling the identity of the assailants and the mystery surrounding the robbery.

In the course of interrogating Janet [A 1], he learnt that Janet [A1] lost, among others things, her cell phone Nokia 2630, on 23rd October, 2009, during the attack and brutal assault on the deceased. In the normal course of investigations, after getting the details of the cell phone Nokia 2630, he [PW7] detailed Safaricom Limited to locate, through frequency, where the said cell phone was being used.

Safaricom Ltd identified that the frequency from Nokia 2630 serial number IMEI-35769/01/463181/1 was in use within Kirinyaga District. That cell phone belonged to Janet [A 1] ***The same was produced as exhibit 6.***

Safaricom Ltd then identified that the frequency for the said cell phone serial number aforesaid was coming from ***0712 181 544***. Eventually, Safaricom Ltd traced the phone, at Kimunya, within Kirinyaga. The user was one Lawrence Kariuki Githinji [A 3]. On interrogation Kariuki [A 3] produced an agreement dated 24th October, 2009 [a few hours after the attack on the deceased] as a testimony of the fact that he bought the same from Anthony Muthii Mati [A 3]. ***The said agreement was received in evidence as exhibit number 7.*** This agreement [exhibit 7] was made between Kariuki [A 3] and Antony Muthii Matii alias Mugendi [A6], on 24th October, 2009. Antony Muthii Mati [A 6] was arrested and on being interrogated, by Amos Gichuki [PW 20], his explanation was that he got the phone from Peter Maina Kibe [A 7], a fellow tout at Githurai Kimbo, on the morning of 24th October, 2009, when the deceased was attacked and severely injured.

No. 51160 Cpl Amos Gichuki [PW 20] established during investigations, that Antony Muthii Mati alias Mugendi [A 6] and Peter Maina Kibe [A7] were not just friends but work mates, matatu-touts, at Githurai Kimbo. That Anthony Muthii Mati claimed that Peter Maina Kibe [A7] sold him the phone. Peter Maina Kibe [A7] denied having sold the phone to Anthony Muthii Mati [A6]. Not being satisfied with the explanation offered by A6 and A7 he decided to charge both of them on the basis of the doctrine of recent possession.

I had the advantage of assessing the demeanour of accused number 6 and accused number 7 in the witness box. They struck me as being economical with the truth. I am persuaded, and find as a fact, that ***both*** accused No. 6 and 7 had jointly stolen the cellphone of Janet [A 1] on the night of 23rd/24th October, 2009. By reason of the evidence of Janet [A1] that the assailants who attacked her husband and terrorized her family also stole her phone, I have come to an irresistible conclusion, on the basis of the doctrine of recent possession, that both accused 6 and 7 were among the assailants that brutally hacked the deceased on the night of 24th October, 2009.

As to how they obtained the cell phone of Janet Janet [A 1] was a fact within their knowledge. It is a burden put squarely on them under section 111[1] of the Evidence Act [Cap 80] Laws of Kenya. Both accused number 6 and 7 have not discharged that burden placed on them squarely courtesy of section 111 [1] of the Evidence Act [Cap 60] Laws of Kenya. In doing so I have not lost sight of section 111[2] of the Evidence Act [Cap 80] Laws of Kenya which does not lessen the duty on the prosecution to prove its case beyond any reasonable doubt.

I reiterate that on the totality of the circumstantial evidence as enumerated herein above, I find as a fact that Janet [A 1] conspired with Evans Obangi Otworu [A 2] to sneak into Garden Estate the four (4) assailants on the night of 23rd October, 2009 using a motor vehicle ***bearing fake number plate KBH 657J***, entered in the gate book [exhibit 3] as a ***taxi*** at 20.19 [in] hours and left at 20.17 [out], two minutes before it arrived!!. After the assailants had accomplished their mission the two again gave them

safe passage out of the said estate. This time round Janet [A1] used her husband's motor vehicle Reg. No. KAX 755J, Toyota Fortuner. Time was 2.20 a.m. When the assailants disembarked at Juja, Janet chose to proceed to Thika to make a report *instead of Juja Police Station*. This does not make sense and gives her a way.

The assailants which included the 4th, 5th, 6th and 7th accused then laid in wait for the deceased. On arrival he was viciously attacked and extensively injured. Eventually the deceased succumbed to his injuries within one year and one day.

In terms of the provisions of section 115 of the Penal Code, the deceased demise is thus linked to the attack on him on 24th October, 2009 at his house in Garden Estate.

Against that backdrop, I reject the defence of Janet [A1] and Evans [A2]. I find both of them guilty as charged. Accordingly I convict them of the offence of murder.

In respect of Lawrence Kariuki [A3], I find as a fact, on the basis of circumstantial evidence presented before me, that he bought the said cell-phone [exhibit 6] from Anthony Muthii Mati [A6]. Evidence that the transaction was transparent is embodied in the agreement received in evidence as exhibit 7. He was thus an innocent purchaser for value without notice of the tainted title. I find no evidence linking him with the robbery at the Gituma's on the night of 23rd/24th October, 2009.

In respect of Clement Munyao Katiku [A4], the circumstantial evidence presented before me is that the cell-phone of Beatrice [PW1] was stolen by the assailants who maimed the deceased, on the night of 24th October, 2009. This cell-phone was, on the evidence, traced to Clement Munyao Katiku [A4], who testified that Andrew Muua Kimomo pledged to him the said cell-phone. This piece of evidence brings into focus the doctrine of recent possession. By reason of Clement [A4] and Andrew [A5] engaging in blame game, as to who possessed or owned exhibit 1, both of them were charged.

I had the advantage of assessing the demeanour of both A4 and A5. They struck me as persons who are economical with the truth. In particular A5 credibility was shattered by the evidence of Florence Ndubi Mutiso [PW8]. Having regard to their demeanor and inclination, I have come to the irresistible conclusion that they were both at the scene of the crime on the night of 23rd/24th October, 2009 when the cell-phone of PW1 was stolen. I reject their defence. I find them guilty as charged. I convict both of them on the basis of the doctrine of recent possession.

The circumstantial evidence linking Anthony Muthii Mati [A6] and Peter Maina Kibe [A7] is with regard to possession of cell-phone, Nokia 2630 stolen from Janet [A1] on the night of 23rd October, 2009. This cell-phone was traced to Anthony Muthii Mati [A6] and Peter Maina Kibe [A7]. Both A6 and A7 have not offered plausible explanation of how they came into possession of the same. This places both of them at the scene of the robbery at the Gituma's residence. I reject the defence of A6 and A7. The same has no ring of truth.

On the basis of the doctrine of recent possession I find both of them guilty of the offence of murder. Accordingly I convict both A6 and A7.

As to the cause of death, it was contended that the deceased died of the medical complications. However, on the basis of the evidence of Dr. Indeche [PW4] who used to treat him, he generally enjoyed good health until he was attacked and injured on 24th October, 2009.

The fact that the deceased was seriously and extensively injured by the assailants led to the complications, which in turn led to his demise, does not lessen the culpability of the accused persons. In any case, he died within 1 year and one day after the attack. His death is thus related or attributed to the injuries sustained when the assailants facilitated by Janet [A1] and Evans [A2] viciously attacked him. In this regard ***section 215 of the Penal Code*** is in point. It provides thus:

1. ***A person is not deemed to have killed another if the death of that person does not take place***

- within a year and a day of cause of death.*
2. *Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done.*
 3. *When the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased.*
 4. *When the cause of death is in part an unlawful act, and in part an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the last unlawful act was done or the day on which the omission ceased, whichever is the later”.*

For the above reasons, I am fully convinced and persuaded that the prosecution has proved its case against A1, A2, A4, A5, A6 and A7 beyond any reasonable doubt. I convict all of them [A1, A2, A4, A5, A6 and A7] of the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

As I said earlier, I find no evidence linking Lawrence [A3] with the offence of murder, he is accordingly acquitted and set free unless lawfully held for some other lawful reasons.

On sentence, I have taken into full consideration all the mitigating circumstances of this case. Having done so, I sentence the accused persons as follows:

Accused 1, to serve a sentence of 30 years imprisonment.

Accused 2, to serve a sentence of 30 years imprisonment.

Accused 4, to serve a sentence of 30 years imprisonment.

Accused 5, to serve a sentence of 30 years imprisonment.

Accused 6, to serve a sentence of 30 years imprisonment.

Accused 7, to serve a sentence of 30 years imprisonment.

Right of appeal 14 days.

Dated and delivered at Nairobi on 27th day of August 2013.

N. R. O. OMBIJA

JUDGE